SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1950~~ 51

No. ~~869~~ 26

THE LORAIN JOURNAL COMPANY, SAMUEL A. HORVITZ, ISADORE HORVITZ, D. P. SELF AND FRANK MALOY, *Appellants,*

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

STATEMENT AS TO JURISDICTION

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PARKER FULTON,
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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil No. 26823

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

THE LORAIN JOURNAL COMPANY, SAMUEL A. HORVITZ, ISADORE HORVITZ, D. P. SELF AND FRANK MALOY,
Defendants-Appellants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court of the Northern District of Ohio, Eastern Division, is unreported. A Copy of the Memorandum Opinion, Findings of Fact, Conclusions of Law and Judgment are attached herewith as Appendix A.

Jurisdiction

The judgment of the District Court was entered on January 5, 1951. A petition for appeal is presented to the District Court herewith, to-wit: on January —, 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 15, U. S. Code, Section 29 and Title 28, U. S. Code, Section 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *U. S.* v. *Line Material Co.*, 333 U. S. 287; *Columbia Gas & Electrical Corp.* v. *American Fuel & Power Co.*, 322 U. S. 279, 382; *International Business Machines Corp.* v. *U. S.*, 298 U. S. 131.

Question Presented

The principal question involved is the scope of Section 2 of the Sherman Anti-Trust Act. Where defendants who publish the only daily newspaper in a municipality refuse to publish advertisements of local advertisers of that municipality who use the facilities of a competing radio station, have the defendants attempted to monopolize interstate trade and commerce in violation of Section 2 of the Sherman Anti-Trust Act?

Statutes Involved

Sections 1, 2 and 4 of the Sherman Anti-Trust Act, as amended (15 U.S.C. Sections 1, 2 and 4) are set forth in Appendix B hereto.

Statement

The United States filed a civil action against The Lorain Journal Company (hereinafter referred to as the Journal) and four of its officers or employees under provisions of

Section 4 of the Sherman Anti-Trust Act seeking to enjoin them from continuing to engage in certain acts in furtherance of an alleged combination and conspiracy in restraint of interstate commerce in news and advertising in supplies and copy used by newspapers and radio stations, and in nationally advertised products in violation of Section 1 of the Act, and an alleged combination and conspiracy to monopolize and an attempt to monopolize interstate trade and commerce in the dissemination of news, advertising and other information in violation of Section 2 of the Act. The United States filed a motion for temporary injunction at the same time the complaint was filed. The motion was heard and denied by the District Court. Thereafter the cause was heard on its merits in March, 1950, and the District Court found defendants had attempted to monopolize interstate commerce in violation of Section 2 of the Sherman Act. In view of its finding as to Section 2, the District Court found it unnecessary to decide whether a combination or conspiracy in restrain of interstate commerce in violation of Section 1, or a combination or conspiracy to monopolize interstate commerce in violation of Section 2 existed.

The salient facts are not in substantial dispute. Since 1933, the Journal has been the only daily (excluding Sunday) newspaper of general circulation published in Lorain, Ohio, a city with a population of approximately 52,000. It has a daily circulation in Lorain of more than 13,000 copies and reaches 99% of the families in the city. The Lorain Sunday News is a small weekly paper published in Lorain on Sundays only. It has a circulation of slightly more than 3,000 copies, distributed almost exclusively in Lorain. One morning and two afternoon newspapers published in Cleveland, located approximately 25 miles from Lorain, are also circulated in the City of Lorain but the Journal enjoys more

than two-thirds of the combined Lorain Circulation of the four newspapers.

The Elyria-Lorain Broadcasting Company is predominantly a local enterprise. It operates with the call letters WEOL and WEOL-FM from its principal studio in Elyria, Ohio, with a small branch studio in Lorain, Ohio. Radio stations WEOL and WEOL-FM were licensed by the Federal Communications Commission in 1948 to serve a small area in northern Ohio located wholly within the State. The stations operate with one kilowatt power and the Calculated Contour Lines Map filed with the Federal Communications Commission shows an intended night time coverage only of Lorain County and portions of five other counties in Ohio; the daytime broadcast contour lines extend over a somewhat larger area, but it is still wholly confined to a small section of northern Ohio. The brochure issued by the broadcasting company to prospective advertisers represents the stations' coverage as being only that outlined in the Contour Maps referred to, that is, only a small portion of northern Ohio.

Broadcasts from stations WEOL and WEOL-FM can be heard in parts of southeastern Michigan and western Pennsylvania. Evidence that the station was heard in those two states was obtained through offering a prize to the most distant listener who would report hearing the stations' broadcast. This in itself is an indication of the "local" nature of the radio stations' activities.

The Elyria-Lorain Broadcasting Company is not affiliated with any national radio network; the programs broadcast, except for the rebroadcast of some sporting events, all originate locally in the stations' studio. Some 65% of the programs originate from musical transcriptions. These transcriptions are supplied by out of state organizations

which have a contract with the broadcasting company licensing use of the transcription and providing for the supplying of the actual records or transcriptions to the broadcasting company. News broadcasts occupies 10 to 12% of the broadcast time. This news is furnished by the United Press News Service pursuant to a regular news service contract. The news is gathered by United Press all over the world, is sent out by teletype to the United Press Office in Columbus, Ohio, and from there it is relayed to the broadcasting company by teletype; some of the news is edited in Columbus to the extent of shortening news items before relaying them to the broadcasting company.

About 16% of the broadcasting company's revenue is derived from national advertising—that is, from advertising contracted for by out of state agencies or advertisers. The remainder is derived from advertisers located in the State of Ohio. The record does not show what portion of the advertising now comes from merchants or other advertisers located in the City of Lorain, Ohio, or what revenues could be expected from local Lorain advertisers in the absence of the defendants' alleged boycott of those local Lorain advertisers who utilized the radio stations' facilities.

The principal charge against defendants is that they formulated and put into execution a plan designed to eliminate the broadcasting company as a competitor of the defendant newspaper in the sale of advertising services to the local merchants and advertisers in the City of Lorain, Ohio. The principal means by which it is claimed that this plan was to be accomplished was the defendants' refusal to accept advertising or continue advertising contracts of those local Lorain advertisers who use or proposed to use the facilities of the broadcasting company in advertising their goods and services over the radio. The District

Court has found that the defendants refused advertising and cancelled contracts of local Lorain advertisers for the purpose charged. That court expressly stated that there was no evidence that defendants on any occasion refused to accept any advertisements offered by any national advertiser or any out of state advertiser because such national or out of state advertiser used or threatened to use the competing advertising facilities of the broadcasting company. The only basis for the District Court's finding of a violation of Section 2 of the Sherman Act was that defendants refused to accept purely local advertising submitted by persons selling goods or services in the immediate vicinity of the City of Lorain, Ohio.

There was no restraint or evidence of attempted restraint by defendants against any supplier of materials or information utilized by the broadcasting company in its operations nor was any restraint exerted against any advertiser utilizing the facilities of the broadcasting company other than those advertisers in the local Lorain area.

The Questions Are Substantial

1. Scope of Section 2.

This appeal is concerned with Section 2 of the Sherman Act. That Section provides "Every person who shall monopolize, or attempt to monopolize * * * any part *of the trade or commerce among the several states* * * * shall be deemed guilty of a misdemeanor."

The District Court has stated or found that defendants attempted to monopolize interstate trade and commerce in violation of Section 2 through the following reasoning: (1) the radio station depends on revenue from local advertisers in order to continue to operate, (2) the defendants' alleged "boycott" of the local Lorain advertisers using the competing radio facilities tended to destroy the radio sta-

tion as a competitor and might put it out of business, (3) the radio station is engaged in interstate commerce because its broadcast can be heard in other states, and (4) therefore, defendants have attempted to monopolize interstate trade and commerce.

This approach to Section 2 of the Sherman Anti-Trust Act is unique. So far as defendants can determine, this is the first time that restraint against a wholly local business activity, as distinguished from local restraint against interstate trade and commerce, has been held to come within the purview of Section 2. This case is not to be confused with those cases involving local monopolies which are achieved or sought by restraint on interstate trade and commerce such as was involved in *Stevens Co.* v. *Foster & Fleiser*, 311 U. S. 255; *U. S.* v. *Yellow Cab Co.*, 332 U. S. 218; *Montage & Co.* v. *Lowry*, 193 U. S. 38; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 235-6; and *William Goldman Theatres* v. *Lowe, Inc.*, 150 F. 2d 738 (C.A. 3, 1945). Those cases involved local monopolies but the activity constituting the monopolization or the attempt to monopolize involved the exclusion of a competitor by restraint against articles or goods moving in interstate commerce. In the above cited cases the local monopoly was effectuated by restricting the freedom of the local buyer to purchase goods moving in interstate commerce or the freedom of the interstate seller to sell in the local market. The restraint operated directly against some item moving in interstate commerce.

In this case there is no restraint against any supplier of the radio station nor any interstate advertiser using the radio station nor any intrastate advertiser except those advertisers located in the local Lorain business area. Had defendants attempted to exert pressure on the United Press or other news services to prevent them from furnishing the

radio station with news service or had defendants exerted pressure on any supplier of the radio station to prevent the station from making its broadcast, an entirely different situation would be presented. Here the only restraint found to exist was a restraint against local advertisers in Lorain, Ohio, contracting for advertising with the competing radio station.

Clearly, if *Bloomenstock Brothers Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436 still represents the law, there is no question of the fact that defendants' activities do not come within the prohibition of Section 2. Actually, this case is a much stronger one against the application of Section 2 than the Bloomenstock case because in this case, no restraint against contracting for advertising across state lines is involved. In the Bloomenstock case it was held that the refusal of the Curtis Publishing Company to accept for publication advertising submitted by out of state agencies, unless such agencies would agree to allow the publishing company to dictate the amount of advertising those agencies would place with other publications, did not constitute a violation of Section 2 because the making of advertising contracts was a local and not an interstate activity. Our case is a stronger one for the non-application of Section 2 because there was no restraint against any out of state advertisers; the only restraint was against the advertisers located in the Lorain business area, all wholly within a small section of the State of Ohio.

Section 2 requires that interstate trade and commerce be the subject of the monopoly or the attempt to monopolize. The Government's Complaint (paragraph 17) charges defendants with an attempt to monopolize the "dissemination of news, advertising and other information in violation of Section 2." The word monopolize means to exclude others from competition; it may be an exclusion on a national scale or it may be exclusion on a local scale.

Either way the exclusion violates Section 2 of the Sherman Anti-Trust Act providing the thing excluded is interstate trade and commerce. Certainly the record shows that the defendants made no attempt either directly or indirectly to exclude the dissemination of any news or the dissemination of advertising or other information in the Lorain business area. The records show that news, advertising and other information were disseminated in the Lorain business area by numerous other radio stations, by at least three Cleveland newspapers and by numerous magazines distributed and sold in that area. The only subject of exclusion from competition was the making of local advertising contracts between the radio station and the Lorain business area advertisers. The District Court's holding that this violates Section 2 is an extension of scope of that law far beyond any previous holding.

2. Radio station engaging in interstate commerce.

Although the judicial concept of interstate commerce is constantly changing and broadening in scope, it is submitted that there is a substantial question involved in this case as to (1) whether the Elyria-Lorain Broadcasting Company is engaged in interstate commerce and (2) if it is so engaged, whether its activity of contracting with local Lorain advertisers is an intrastate activity separable from its interstate activity. The District Court has found that the radio station was engaged in interstate commerce primarily because its broadcast can be heard in portions of two other states. It is submitted that the record in this case will show that the station is intended to serve a small local area, that the programs and advertising carried by the station can be expected to have an impact only on those persons located in that small area and that the fact that it is sporadically heard by a few persons in other states is, as the Arkansas Court in the Beard, Collector v. Vinson-

haler, 221 S.W. 2d 3, (Supreme Court of Arkansas 1940) appeal to United States Supreme Court dismissed for want of substantial Federal question 96 L. Ed. 67 (1949), stated:

> "Merely an adventitious consequence of the uncontrollable carrying power of radio waves."

Even more important is the question whether the radio station's business activity of soliciting and contracting for advertising with local advertisers is inter or intra-state commerce. The District Court has treated the entire business activity of the radio station as being an inseparable part of interstate commerce. There is ample authority to the effect that a business organization otherwise engaged in interstate commerce may be engaged in intrastate commerce in certain of its aspects. Thus, in *Western Livestock Co.* v. *Bureau of Revenue*, 303 U. S. 250, the selling of advertising space by a publishing company, even though the sales were interstate in character, was intrastate activity subject to local taxation. For similar holdings involving radio stations see *Albuquerque Broadcasting Co.* v. *Bureau of Revenue*, 51 N.M. 332, 184, Pac. 2d 416 (1947) and *Beard, Collector* v. *Vinsonhaler*, 221 S.W. 2d 3. Reference is also made to the *Bloomenstock* case discussed under the first question raised in this statement.

3. Impact of First Amendment of the Constitution of the United States.

The District Court's decree in effect is a mandatory injunction requiring defendants to accept for publication advertising submitted by any advertisers using the competing radio station's facilities. In this respect the decree constitutes a prior restraint on freedom of the press. Freedom of the press includes the right to refuse to publish as well as the right to publish whatever the publisher pleases. Even if the publisher's refusal to accept for publication

certain matter constitutes a violation of the Sherman Anti-Trust Act and renders the publisher subject to the penal provisions of that Act, still the Sherman Act does not and can not constitutionally empower a Court to exercise prior restraint against the freedom guaranteed by the First Amendment. The leading case on this subject is *Neer* v. *Minnesota*, 283 U. S. 697.

The freedom of press guaranteed by Amendment 1 applies with equal force to the freedom not to publish, as well as freedom to publish. Therefore, the provision in the Court's decree which requires and orders the corporate defendant, The Lorain Journal Company, to publish the decree, or its substantial terms, compels defendant to publish where it may desire and wish not to publish.

4. Impact with Other Provisions of the Constitution of the United States.

The police provisions of this decree require defendant to make available its books, records, etc. for a period of five years. This means that during five years the Government will have a right to search and seize such books and records in contravention of Article IV of the Amendments of the Constitution of the United States; and in effect shifts the burden of proof in any proceedings brought under the decree, and in such proceedings will compel the defendants to be witnesses against themselves without trial by jury, in violation of Articles VI and VII of said Amendments to said Constitution of the United States.

(S.) KING E. FAUVER,
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APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Filed Aug. 29, 1950. C. B. Watkins, Clerk; U. S. District Court, N.D.O. 12:10 P.M.

Civil Action No. 26823

UNITED STATES OF AMERICA, *Plaintiff*

vs.

THE LORAIN JOURNAL COMPANY, SAMUEL A. HORVITZ, ISADORE HORVITZ, D. P. SELF, and FRANK MALLOY, *Defendants*

MEMORANDUM

FREED, *J.:*

This is a civil action instituted by a complaint filed by the United States under Section 4 of the Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1-7 against the defendants, The Lorain Journal Company, an Ohio corporation which publishes the Journal and Times-Herald (hereinafter the "Journal"), Samuel A. Horvitz, Vice President, Secretary, and a director of the corporation, Isadore Horvitz, President, Treasurer, and a director of the corporation, D. P. Self, Business Manager of the Journal, and Frank Maloy, Editor of the Journal. It seeks to enjoin them from continuing to engage in certain acts in furtherance of an alleged combination and conspiracy in restraint of the interstate commerce of competitive news and advertising media and of their advertisers in violation of Section 1 of the Act, and an alleged combination and conspiracy to monopolize and an attempt to monopolize news and advertising channels in violation of Section 2 of the Act.

There is no dispute as to those salient facts which are dispositive of the issues raised. Since 1933, the Lorain Journal has been the only daily (excluding Sunday) newspaper of general circulation published in Lorain, Ohio, a city with a population of approximately 52,000. Prior to that time a competing daily newspaper called the Times-

Herald was published and circulated in Lorain, but in December, 1932 its assets were purchased by the Lorain Journal Company, the Mansfield Journal Company, and defendant Samuel A. Horvitz.

The Journal's position in the community is a commanding and an overpowering one. It has a daily circulation in Lorain of over 13,000 copies and it reaches ninety-nine per cent of the families in the city. The Lorain Sunday News is a small weekly published in Lorain on Sundays only. It has a circulation of slightly over 3,000 copies, distributed almost exclusively in Lorain. The Chronicle-Telegram, a daily (excluding Sunday) newspaper of general circulation, is published eight miles away in Elyria, Ohio, but that newspaper is not distributed in Lorain although the Journal is sold in Elyria. The one morning and two afternoon newspapers published in nearby Cleveland have some circulation in Lorain, but the Journal enjoys more than two-thirds of the combined Lorain circulation of the four newspapers.

The evidence makes it clear that the Journal has no competitor for the newspaper advertisements of Lorain merchants except for the extremely limited competition provided by the Lorain Sunday News.

The first serious competitive cloud appeared on the Journal's previously unlimited horizon in October, 1948, when, pursuant to Federal Communications Commission's license, radio stations WEOL and WEOL-FM began broadcasting operations from studios in Lorain and Elyria. The Journal had previously attempted without success to obtain a radio broadcasting license.

The principal charge of the complaint and the proof was that the defendants formulated and put into execution a plan designed and intended to eliminate this threat by the device of refusing to publish advertisements for local merchants who used the radio stations.[1]

[1] In addition to this central theme of the complaint and the proof, the Government charged the defendants with practices directed against the Lorain Sunday News and the Elyria Chronicle-Telegram. Some proof was adduced in support of these charges but that proof is too inconclusive to justify the findings sought by the Government. Those charges are therefore disregarded in the main body of this memorandum.

This charge has been clearly established. The record reveals a story of bold, relentless, and predatory commercial behavior. The Journal, its officers and employees, informed merchants who proposed to advertise over the radio stations that if they did so, their terminable advertising contracts with the Journal would be brought to an end and would not be renewed. The Journal monitored the programs of WEOL to learn who was using the advertising facilities of the radio station and those who did advertise over the radio had their contracts terminated, and were permitted to renew them only after they ceased to use WEOL. Numerous Lorain County merchants testified that, as a result of the Journal's policy, they either ceased or abandoned their plans to advertise over WEOL.

The Journal refused to carry the program logs of WEOL as paid advertisements although it prints the logs of some Cleveland stations in its news columns, and it even refused to publish an advertisement seeking employees to staff the radio station.

No excuse was offered to the prospective advertiser in many instances for the peremptory refusal to accept the advertising if he used the radio station. On some occasions, when merchants remonstrated or sought an explanation, they were informed that it was the policy of the Journal to require advertisers to give the radio a "'fair"—that is, an exclusive—trial or they were informed that the policy was designed to "protect" the Lorain merchants by preserving the integrity of the Lorain market.

Those same rationalizations were advanced to this Court as the justifications for the behavior of the defendants, and this Court, like the Lorain merchants to whom they were first presented, is not convinced. The assertion that the Journal's policy was designed to permit advertisers to give the radio a fair test is too specious for any comment other than that it is unworthy of belief and unworthy of the astuteness and sharp business intelligence noticeably displayed on the witness stand by the defendant Samuel Horvitz, the dominant figure in the operation of the Journal. That the Journal was attempting to create an economic oasis in Lorain seems incredible, and it is difficult for the

Court to see how the defendants could reasonably ascribe this activity to a benevolent desire to protect the Lorain merchants from themselves where the obvious result was to deprive those merchants of a channel which might attract additional business to their market at the very time that merchants in neighboring communities served by WEOL were using it for that purpose.

From the evidence there can be no doubt that the policy was as uncomplicated in purpose and as lacking in subtlety as the profit motive itself: the Journal sought to eliminate this threat to its pre-eminent position by destroying WEOL.

WEOL was licensed for the purpose of serving an area located wholly within the boundaries of Ohio. However, its broadcasts can be and are heard in southeastern Michigan. Numerous persons testified that they heard the broadcasts from WEOL on home or automobile receiving sets in Michigan, and it was agreed that additional witnesses would give similar testimony if called. A radio engineer who conducted field tests gave his opinion that WEOL might be satisfactorily heard on receiving sets in various places in southeastern Michigan during daylight hours.

WEOL is not affiliate with any national network. The majority of its programs originate in its local studios. However, in the past year, it carried broadcasts of over one hundred athletic events originating at places outside of Ohio. About sixty-five per cent of WEOL's broadcast time is devoted to the playing of musical transcriptions which are leased to WEOL by companies located outside of Ohio. WEOL devotes about ten to twelve per cent of its total broadcast time to news broadcasts. These broadcasts consist in part of world and national news gathered outside of Ohio and provided to WEOL by United Press teletype.

The income of WEOL is predominantly derived from the advertising of local merchants. Sixteen per cent of its gross income in 1949 was obtained from "national advertisers" who seek to promote good will for a particular product on a national scale. In a relatively few instances WEOL has broadcast advertising for out-of-state suppliers who were soliciting orders to be filled by direct shipment.

There was no evidence that either of these two classes of advertisers has yet been refused access to the columns of the Journal because of their use of WEOL.

These are the facts upon which the Government predicates its charges, foremost of which is the charge of an attempt to monopolize.

The position of the Journal as the only significant medium of newspaper advertising in the City of Lorain may not, in and of itself, have constituted monopolization within the meaning of the Sherman Act, although it is a monopoly in common parlance. But the abuse of the power inherent in its position to compel a customer boycott of WEOL is a different matter. For "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." U. S. vs. Griffith, 334 U. S. 100, 107.

The defendants have urged upon the Court, in another connection, the principle that a single trader has a right to deal or to refuse to deal with whomever it pleases for whatever reason it pleases, so long as it does not combine with others to achieve its end. The classic statement of that doctrine recognized the right only in "the absence of any purpose to create or maintain a monopoly". U. S. v. Colgate & Co., 250 U.S. 300, 307. The Journal admittedly has a right to select its advertisers for good reason or without reason, but it has no right in pursuit of a monopoly to require them not to deal with a competitor.

Where that is the purpose and design with which the defendants act, it is legally immaterial whether the course of action is or might be successful. As a practical matter no enterprise would singlehandedly embark upon or persist in such behavior unless attainment were a possibility. The success crowning the Journal's efforts does not result from competition in the healthy sense of superior business skill and efficiency, but from the fact that while the Journal and WEOL are competitors, there is an area where the services they provide are complementary rather than competitive in nature. A customer rebuked by one does not have entire satisfaction merely because he may resort to the other. The Journal has used this leverage to prevent

any encroachment upon its supremacy in the field where WEOL is in strict competition with it.

The defendants do not in effect deny that they have attempted to monopolize, but they seek to avoid the ban of the Sherman Act on the ground that only a local monopoly and not a monopoly of interstate commerce was sought. Assume that a monopoly of the business of selling news locally does not involve a monopoly of the interstate channels through which that "commodity" comes to Lorain. And assume further that the monopoly of the business of selling advertising space locally does not constitute a monopoly of interstate business because out-of-state advertisers use that service. See Blumenstock Bros. v. Curtis Publishing Co., 252 U.S. 436. But cf. U. S. v. South-Eastern Underwriters Assn., 322 U.S. 533. Even under these assumptions it does not follow that the defendants' attempt to monopolize the business of selling news and advertising space locally is beyond the reach of the Sherman Act.

Local monopolies are proscribed by the Act where they are achieved or sought by restraint of interstate commerce. Stevens Co. v. Foster & Kleiser, 311 U.S. 255; William Goldman Theaters, Inc. v. Loews, Inc., 150 F. (2d) 738; White Bear Theater Corp. v. State Theater Corp., 129 F. (2d) 600. See, Mandeville Islands Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235-6. In these cases local monopolies were achieved by combination or agreement with, or the exertion of pressure upon out-of-state suppliers to exclude others from a local market. The means through which local monopoly was effectuated "restrained" interstate commerce by restricting the freedom of a local buyer to purchase in the interstate market or the freedom of the interstate seller to sell in the local market.[2]

The means employed by the defendants to achieve their purpose has not in that sense restrained interstate commerce, but the ultimate end here is the destruction of the radio station in all its aspects. Having the plan and desire to injure the radio station, no more effective and

[2] White Bear Theater Corp. v. State Theater Corp., supra, falls into this pattern, for the purchase of the entire supply of the particular commodity blocked the access of a local competitor to the interstate market.

more direct device to impede the operations and to restrain the commerce of WEOL could be found by the Journal than to cut off its bloodstream of existence—the advertising revenues which controls its life or demise. And in this Court's judgment WEOL is engaged in interstate commerce and therefore entitled to the protection of the Sherman Act.

It is doubtful whether there exists a purely "intra-state" radio station. "By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause." Fisher's Blend Station v. State Tax Commission, 297 U.S. 650, 655.[3]

Perhaps a radio station which never broadcasts a program originating outside of the state and which is never heard beyond the boundaries of a single state might, within the concept of the Sherman Act, be treated as a purely local business. Even if that were true, WEOL differs in those two significant features. While WEOL was licensed to serve and primarily serves an area located wholly within the state, the evidence establishes that it can be and is heard in Michigan. Nor can the Court disregard these transmissions as inconsequential, for they have not resulted from a felicitous combination of circumstances on merely a few, sporadic occasions, but have taken place, the Court must conclude from the only line of evidence presented, with a fair degree of regularity.

The transmissions of WEOL which have their origin as broadcast energy outside of Ohio comprise interstate commerce though heard only by listeners within the state, for WEOL is an inseparable link in the chain of an interstate journey which carries the voice of the speaker to the ear of the listener. While these broadcasts of athletic events may represent but a small portion of WEOL's program schedule, they can not be dismissed as trifling. WEOL was

[3] See also, Wilson v. Shuman, 140 F. (2d) 644 (Fair Labor Standards Act); Los Angeles Broadcasting Co., 4 N.L.R.B. 443 (National Labor Relations Act). On the question of the power of the State to tax the activity of radio broadcasting, see the annotation at 11 A.L.R. (2d) 986.

licensed in response to a public need and interest, and it must be assumed that, although it may not be the only avenue through which these interstate programs can reach the local community, it provides an important medium for this service.

The defendants make much of the fact that they did nothing more than inhibit the intercourse between local merchants and the radio station and proclaim that they had no desire to prevent the radio station's transmissions which come from out of state or which passed across state lines. Here, the defendants ignore the fact that the radio station may be completely driven out of existence by depriving it of advertising revenue. A radio station, unlike a newspaper, does not sell the news and entertainment it provides. Advertising revenues support the service provided to the listening public. It is not necessarily true that local merchants are indifferent to whether their advertising messages reach listeners in Michigan, but, even if that be true, it would not follow that those listeners are indifferent to the programs they hear.

While the activities of the defendants may be local in execution, the very existence of WEOL is imperiled by this attack upon one of its principal sources of business and income. Although the Sherman Act is not a panacea to cure every local commercial evil and hindrance to local competition, the present context of facts offers a situation within its scope, for the attempted monopoly threatens a business which in inseparable characteristics, if not in volume, is undeniably interstate in nature. The Sherman Act is the foundation of economic freedom in interstate commerce and to that end it sweeps aside restrictive practices local in setting which substantially affect an interstate business. U. S. v. Women's Sportwear Manufacturers Assn., 336 U.S. 460. This Court is pressed to the conclusion that radio broadcasting in general, and radio station WEOL in particular, is entitled to the protection the Act affords.

The remaining charges of conspiracy to restrain and to monopolize pose a problem to which a great deal of attention has been devoted by both the Government and defendants: namely, whether a conspiracy within the meaning

of the Sherman Act can be found to exist between and among a single corporation and the officers and employees who act for it. For the defendants argue that the "conspiracy" here is the formulation of business policy for a single enterprise.

That problem is not presented in connection with the charge of attempted monopolization for a single corporation and the individuals through whom it acts and who shape its intentions can commit that offense. U. S. vs. MacAndrews & Forbes Co., 149 Fed. 823, 836, writ of error dismissed 212 U. S. 585; Fleetway, Inc. v. Public Service Interstate Transportation Co., 72 F. (2d) 761, cert. denied 293 U. S. 626.

Defendants urge that the individual corporation has at its disposal only so much commercial strength, which is not altered in effectiveness whether it acts through only one or through more of its officers and employees. And the defendants' argument is in substance that the conspiracy sections of the Sherman Act were designed to strike only at those situations where the economic power exerted has been enhanced by a confederacy of otherwise independent business enterprises and not where coercive restraints are attempted or accomplished by a so-called "single trader".

The Government contends that there is no reason of language why the Sherman Act should receive an interpretation different from that which has been given to other conspiracy statutes.[4] And as for the substantive argument of defendants, the Government presses upon the Court that line of cases which have emphasized the character of the restraint rather than the economic oneness of the offending conspirators.[5]

It has been demonstrated that the monopoly attempted by the Journal—even conceived of as an attempt to monop-

[4] Minnishon v. U. S., 101 F. (2d) 477; Egan v. U. S., 137 F. (2d) 369, cert. denied 320 U. S. 788; Miller v. U. S., 125 F. (2d) 517, cert. denied 316 U. S. 687; See American Medical Association v. U. S., 130 F. (2d) 233, 253.

[5] Schine Theaters, Inc. v. U. S., 334 U. S. 110, 116; U. S. v. Yellow Cab, 332 U. S. 218, 227; U. S. v. General Motors Corp., 121 F. (2d) 376, 404, cert. denied 314 U. S. 618; U. S. v. New York Great A. & P. Co., 173 F. (2d) 79, 87-88. And see Patterson v. U. S., 222 Fed. 599.

olize only local business—is proscribed by the Sherman Act. The relief to be granted for that violation of law should terminate all the abuses in which the defendants indulged. This renders the solution of the controversy in respect of the charges of conspiracy of mere academic interest, and makes its determination unnecessary in this instance.

The relief to be granted brings from the defendants an appeal to the constitutional guarantee of a free press. At the outset, it can no longer be denied that newspapers like other businesses are subject to the Sherman Act. Associated Press v. U. S., 326 U. S. 1; Associated Press v. National Labor Relations Board, 301 U. S. 103, 133. The defendants do not contend that the criminal sanctions of the Act would be inapplicable, but they assert that the Court is powerless to issue even a prohibitory injunction restraining them from refusing to accept advertising where the basis for such refusal is the advertiser's use of the radio station, since to do so would involve a "prior restraint" upon their freedom to publish or to refuse to publish whatever they wish.

There is no appeal to any Court more apt to strike a responsive chord than an appeal to rights guaranteed by the First Amendment and under no consideration would this Court reach the conclusions here expressed were they instrumental in undermining or even affecting a free press. In the balance of our Constitutional scheme the importance of the First Amendment may be such that sanctions consonant with the Commerce Clause and clearly applicable to other enterprises can not be used against a newspaper. Sun Publishing Co. v. Walling, 140 F. (2d) 445, cert. denied 322 U. S. 729.

With all this, the Court can not conceive that the First Amendment renders it impotent to enjoin the defendants' practices. The right of a newspaper to reject advertising arises from the fact that a free press is also a private business. The defendants did not exercise their right of rejection because the advertising offered was offensive in substance or even because the prospective advertisers were not the sort of persons with whom they wished to deal. Their refusal to deal was based solely on a desire to force these

advertisers not to continue or to enter into relations with another available mode of communication. This is a vice condemned by the Sherman Act and the evil may be restrained without affecting the operations of the Journal as an organ of opinion and without touching upon the legitimate conduct of its business affairs. Prior restraint on the substance of expression is one thing; injunctive relief against the repetition of the commercial abuse proved here is quite another.

It would be strange indeed to pervert the liberty proclaimed by the First Amendment into a license for the continuation of a dictatorial course of action designed to suppress another and equally important instrumentality of information and expression. The purposes sought to be served by that Amendment would not survive many such paradoxes.

The United States is entitled to relief.

In conformity with Rule 4B of this Court, findings of fact and conclusions of law will be submitted and the Government will likewise submit a proposed form of decree.

(S.) FREED,
United States District Judge.

AUGUST 29, 1950.

IN THE DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. 26823—FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

THE LORAIN JOURNAL COMPANY, SAMUEL A. HORVITZ, ISADORE HORVITZ, D. P. SELF, and FRANK MALOY, DEFENDANTS

FINDINGS OF FACT

1. Each of the individual defendants is an inhabitant of the Eastern Division of the Northern District of Ohio.

2. Defendant The Lorain Journal Company is a corporation organized under and existing by virtue of the laws of the State of Ohio. It transacts and has its only places of business in the cities of Cleveland, Ohio and Lorain, Ohio, both within the Eastern Division of the Northern District of Ohio.

3. Defendant The Lorain Journal Company publishes in the City of Lorain, Lorain County, Ohio, a daily (excluding Sunday) newspaper of general circulation known as the Journal and Times-Herald (hereinafter referred to as the Journal).

4. Defendant Samuel A. Horvitz, at all times from early in the year 1934 to date, has been the Vice-President, Secretary and a director of The Lorain Journal Company. For some time prior to the time in 1934 when he became Vice-President, he was President and a director of defendant The Lorain Journal Company.

5. Defendant Isadore Horvitz, at all times from early in the year 1934 to date, has been President, Treasurer and a director of defendant The Lorain Journal Company. For some time prior to the time in 1934 when he became President, he was Vice-President and a director of defendant The Lorain Journal Company.

6. Defendant D. P. Self, at all times from March 1947 to date, has been Business Manager of the Journal.

7. Defendant Frank Maloy for some years has been and now is the Editor of the Journal.

8. The Journal is the only newspaper of general daily (excluding Sunday) circulation published in Lorain, Ohio. It reaches 99 per cent of the families in that city.

9. Prior to 1933 a daily newspaper known as the Times-Herald, competing with the then Journal, was published and circulated in the City of Lorain. In December 1932, the defendant The Lorain Journal Company, the Mansfield Journal Company, a corporation, and defendant Samuel A. Horvitz jointly purchased the assets of the Times-Herald.

10. The total daily circulation of the Journal is approximately 20,690 copies, of which 13,151 are distributed in the City of Lorain, 7,374 elsewhere in the State of Ohio, and

the remaining 165 are shipped from Lorain to subscribers located in other states and elsewhere.

11. There are no newspapers that compete with the Journal as a medium for the dissemination of advertisments by Lorain merchants except for the extremely limited competition provided by the Lorain Sunday News, which is the only Sunday newspaper of general circulation published in the City of Lorain, Ohio. It has a weekly circulation of approximately 3,356, of which 3,167 copies are sold in the City of Lorain.

12. The Journal has no substantial competition from any daily newspaper as a medium for the dissemination of news and national advertising in the City of Lorain.

13. The radio broadcasting stations having call letters WEOL and WEOL-FM are owned and operated by the Elyria-Lorain Broadcasting Company, a corporation. Said stations have broadcast daily commencing October 17, 1948, over frequencies of 930 kilocycles and 107.6 megacycles, respectively. Their broadcasting studios are located in Elyria, Ohio and Lorain, Ohio.

14. In operating WEOL and WEOL-FM, the Elyria-Lorain Broadcasting Company competes, or attempts to compete, with the defendant The Lorain Journal Company in the dissemination of news and advertising.

15. At all times since WEOL and WEOL-FM commenced operations, the defendants have known that a substantial number of the advertisers in the Journal desired to use the facilities of the Elyria-Lorain Broadcasting Company, as well as those of the Journal, as media for the dissemination of their advertisments. In order to promote the sale of their goods and services in Lorain County, it is essential for some of these advertisers to advertise in the Journal.

16. At all times since WEOL and WEOL-FM commenced broadcasting it has been the plan of the defendants to eliminate the threat of competition from these stations by refusing to accept advertisements for publication in the Journal from those advertisers in Lorain County who advertise or who the defendants believe are about to commence advertising over WEOL and WEOL-FM.

17. The purpose and intent of the defendants in adopting and carrying out the plan referred to in finding 16 is to prevent the Elyria-Lorain Broadcasting Company from obtaining any advertising revenue from any Lorain merchants and thereby to destroy the Elyria-Lorain Broadcasting Company.

18. Pursuant to the plan referred to in finding 16, defendant The Lorain Journal Company monitored the programs of WEOL and WEOL-FM to learn who was using the advertising facilities of these stations. Thereafter, by letters written by defendant Self, with the authorization of defendants Samuel A. Horvitz and Isadore Horvitz, defendant The Lorain Journal Company cancelled the advertising contracts between it and 15 Lorain County advertisers who had advertised or who were about to commence advertising over WEOL and WEOL-FM. In addition, defendants Self and Maloy, and other Journal representatives, effectuated said plan by informing many advertisers orally that they could not continue to advertise in the Journal if they advertised over WEOL, and by refusing to accept advertising copy proffered by Lorain County merchants who were advertising over WEOL and WEOL-FM.

19. As a result of the defendants' activities referred to in finding 18, many advertisers refrained from advertising over WEOL and WEOL-FM, and consequently most of the contracts referred to in finding 18 were reinstated by defendant The Lorain Journal Company.

20. Since October 1948 the Journal has consistently printed in its news columns the logs of some radio stations situated in Cleveland, Ohio, and has frequently printed advertisements of radio programs to be broadcast by radio stations in Cleveland, Ohio, but the defendants have refused to publish as paid advertisements or otherwise the program logs of radio stations WEOL and WEOL-FM and refused to publish an advertisement submitted by the Elyria-Lorain Broadcasting Company seeking employees to carry on broadcasting operations.

21. News and features gathered from various parts of the United States and other countries are transmitted in

foreign and interstate commerce to defendant The Lorain Journal Company for publication in the Journal.

22. Advertising copy, matrixes, checks and other documents and materials are shipped from various parts of the United States in interstate commerce to defendant The Lorain Journal Company pursuant to advertising contracts between the defendant The Lorain Journal Company and national advertisers or their agents.

23. WEOL and WEOL-FM broadcast in interstate commerce and their broadcasts are heard with a degree of regularity by many persons resident in the southeastern portion of the State of Michigan. These broadcasts include commercially sponsored programs soliciting the sale of goods and services.

24. Substantially all of the income of the Elyria-Lorain Broadcasting Company is derived from payments for its broadcasts of advertisments for the sale of goods and services. About 16 per cent of this income is derived from broadcasts advertising the sale of goods and services pursuant to advertising contracts between it and advertisers or their agencies located outside the State of Ohio. Pursuant to these advertising contracts there is a continuous flow in interstate commerce of advertising copy, transcriptions, checks and other documents and materials.

25. In a relatively few instances WEOL and WEOL-FM broadcast programs advertising the sale of goods and services by suppliers outside Ohio. As a result of these broadcasts orders are received by those suppliers from residents in Ohio ordering the shipment in interstate commerce of the goods and services from the out-of-state suppliers direct to said Ohio residents. Many of those merchants who desired to advertise over WEOL and WEOL-FM but who refrained from or ceased doing so because of the activities of the defendants, occasionally receive specific orders from customers in Lorain County and upon receipt of such orders, forward them to suppliers located outside the State of Ohio. Pursuant to said orders, goods are in some cases shipped in interstate commerce direct to customers located in Ohio and in the other cases said orders are filled by shipments in interstate commerce from the manufacturers

to merchants in Lorain County who deliver them to the customers. In some cases the advertising materials used in publishing the advertisements of these merchants come from the merchants' suppliers located outside the State of Ohio and are shipped in interstate commerce direct from those out-of-state suppliers to the offices of the Journal.

26. About 65 per cent of the broadcast time of WEOL and WEOL-FM is devoted to the playing of music broadcast by means of electrical transcriptions which are leased and shipped to the Elyria-Lorain Broadcasting Company in interstate commerce by the suppliers thereof. Most or all of these transcriptions are copyrighted, and consequently the Elyria-Lorain Broadcasting Company makes substantial payments annually in interstate commerce to the holders of the copyrights thereon.

27. About 10 to 12 per cent of the broadcast time of WEOL and WEOL-FM is devoted to broadcasts of news, world-wide in coverage, gathered by the United Press Associations from all over the world and sent in interstate commerce by United Press Associations to WEOL and WEOL-FM.

28. WEOL and WEOL-FM customarily broadcast commercially sponsored sports events originating in various states other than the State of Ohio.

29. All the defendants have engaged and are now engaging in an attempt to monopolize local commerce in the daily dissemination of news and advertising in Lorain, Ohio, by destroying WEOL and WEOL-FM, which radio stations are engaged in interstate commerce.

(S.) FREED,
United States District Judge.

JANUARY 5, 1951.

IN THE DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. 26823

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

THE LORAIN JOURNAL COMPANY, SAMUEL A. HORVITZ, ISADORE HORVITZ, D. P. SELF, and FRANK MALOY, DEFENDANTS.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter hereof and of each of the defendants, and the complaint states a cause of action against the defendants under the provisions of the Act of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended, commonly known as the Sherman Act.

2. The defendants have violated and are now violating Section 2 of the Sherman Act by engaging in an attempt to monopolize trade and commerce among the several states within the meaning of Section 2 of the Sherman Act.

(S.) FREED,
United States District Judge.

JANUARY 5, 1951.

IN THE DISTRICT COURT OF THE UNITED STATES
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Civil Action No. 26823

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THE LORAIN JOURNAL COMPANY, SAMUEL HORVITZ, ISADORE HORVITZ, D. P. SELF, and FRANK MALOY, DEFENDANTS.

FINAL JUDGMENT

Plaintiff, United States of America, filed its complaint herein on September 22, 1949 and filed its amended complaint on January 4, 1950. The defendants filed their answers to said complaint on October 11, 1949, and to said amended complaint on January 13, 1950. This cause came on for trial March 1, 1950, and trial was completed on March 14, 1950. The Court filed its opinion August 29, 1950 and on January 5, 1951 filed its findings of fact and conclusions of law, finding and adjudging the defendants to have violated Section 2 of the Sherman Act.

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I

The provisions of this judgment applicable to defendant The Lorain Journal Company shall apply to it, its officers, directors, agents, employees and attorneys and to those persons in active concert or participation with it or them who receive actual notice of this judgment by personal service or otherwise.

II

Defendants have violated Section 2 of the Act of Congress of July 2, 1890, 26 Stat. 209, Title 15 U.S.C. § 2, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, by engaging in an attempt to monopolize trade and commerce among the several states.

III

Defendant The Lorain Journal Company is enjoined and restrained from:

A. Refusing to accept for publication or refusing to publish any advertisement or advertisements or discriminating as to price, space, arrangement, location, commencement or period of insertion or any other terms or conditions of publication of advertisement or advertisements where the reason for such refusal or discrimination is, in whole or in part, express or implied, that the person, firm or corporation submitting the advertisement or advertisements has advertised, advertises, has proposed or proposes to advertise in or through any other advertising medium.

B. Accepting for publication or publishing any advertisement ~~or making or adhering to~~ any contract for the publication of advertisements on or accompanied by any condition, agreement or understanding, express or implied:

1. That the advertiser shall not use the advertising medium of any person, firm or corporation other than defendant The Lorain Journal Company;

2. That the advertiser use only the advertising medium of defendant The Lorain Journal Company;

C. Cancelling, terminating, refusing to renew or in any manner impairing any contract, agreement or understanding, involving the publication of advertisements, between the defendants, or any of them, and any person, firm or corporation for the reason, in whole or in part, that such person, firm or corporation advertised, advertises or proposes to advertise in or through any advertising medium other than the newspaper published by the corporate defendant.

IV

Commencing fifteen (15) days after the entry of this judgment and at least once a week for a period of twenty-five weeks thereafter the corporate defendant shall insert in the newspaper published by it a notice which shall fairly and fully apprise the readers thereof of the substantive

terms of this judgment and which notice shall be placed in a conspicuous location.

V

Defendant The Lorain Journal Company and the individual defendants are ordered and directed to:

A. Maintain for a period of five (5) years from the date of this judgment, all books and records, which shall include all correspondence, memoranda, reports and other writings, relating to the subject matter of this judgment;

B. Advise in writing within ten (10) days from the date of this judgment any officers, agents, employees, and any other persons acting for, through or under defendants or any of them of the terms of this judgment and that each and every such person is subject to the provisions of this judgment. The defendants shall make readily available to such persons a copy of this judgment and shall inform them of such availability.

VI

For the purpose of securing compliance with this judgment, and for no other purpose, any duly authorized representative or representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and on notice reasonable as to time and subject matter made to the principal office of the Lorain Journal Company, and subject to any legally recognized privilege, be permitted:

A. Access during the office hours of said corporate defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said corporate defendant relating to any matters contained in this judgment;

B. Subject to the reasonable convenience of said corporate defendant and without restraint or interference from defendants, to interview officers or employees of said defendants, who may have counsel present, regarding such matters, provided, however, that no information obtained by the means provided in this Section VI shall be divulged by the Department of Justice to any person other than a

duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party, or as otherwise required by law.

VII

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate in relation to the construction of, or carrying out of this judgment, for the amendment or modification of any of the provisions thereof, or the enforcement of compliance therewith and for the punishment of violations thereof.

VIII

Judgment is entered against the defendants for all costs to be taxed in this proceedings.

(S.) FREED,
United States District Judge.

JANUARY 5, 1951.

APPENDIX "B"

Section 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * July 2, 1890, c. 647, Section 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693. (15 U.S.C.)

Section 2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or

by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violation of sections 1-7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petitions the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."